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February 10, 2005

Mr. G. John Heyer  
Committee for Purchase From  
People Who Are Blind or Severely Disabled  
1421 Jefferson Davis Highway  
Jefferson Plaza 2, Suite 10800  
Arlington, VA 22202-3529

Dear Mr. Heyer:

On behalf of the Association of Fundraising Professionals (AFP) and our 23,000 members in the U.S., I am writing to urge you to reconsider your proposed rule affecting nonprofit agencies that are awarded government contracts under the authority of the Javits-Wagner-O'Day (JWOD) Act. In light of Congress' current efforts to reform the charitable sector, this proposed rule is premature and potentially redundant. In addition, the proposed rule creates agency redundancy given that the Internal Revenue Service (IRS) already has oversight and enforcement jurisdiction over the governance standards of charities. More importantly, as written, the proposed rule is unfairly burdensome and would detrimentally affect charities throughout the country.

### Background

AFP is the largest association of professional fundraisers in the world. It represents more than 26,000 individuals serving in more than 15,000 nonprofit organizations, including 23,000 in the U.S. AFP members work for a wide variety of charities, from large multi-national institutions to small, grassroots organizations, engaged in countless missions and causes including education, health care, research, the environment and social services, to name a few.

AFP members are required annually to sign our Code of Ethical Principles and Standards of Professional Practice, which were first developed in 1964. AFP instituted a credentialing process in 1981 – the CFRE, Certified Fund Raising Executive designation to aid in identifying for the giving public fundraisers who possess the demonstrated knowledge and skills necessary to perform their duties in an effective, conscientious, ethical, and professional manner. We also have a strong ethics enforcement policy that can result in the revocation of credentials and expulsion of members who engage in prohibited behavior.

This background is cited to emphasize the importance that AFP and its members place on ethical fundraising. Much of our work is spent educating and training members in ethical fundraising practices and working with federal and state regulators to improve regulation and identify illegitimate parties who abuse the philanthropic process. Fundraisers are stewards of the public's money, and the success of the nonprofit sector and our individual organizations is dependent upon public trust and confidence.

AFP does not oppose demonstrably necessary fundraising regulations. Legitimate fundraisers understand the need for regulation, and AFP has supported many initiatives on both the federal and state levels that have provided for necessary and appropriate regulation of charities and fundraising. But in each case, the regulations that AFP has supported have been balanced with the charitable sector's need to raise funds for the critical programs it provides.

In this case, however, the Committee for Purchase From People Who Are Blind or Severely Disabled's proposed rule concerning JWOD fails to reach this balance. This regulation will cause confusion in the charitable sector while doing little to accomplish its stated goal of consumer protection and the transparent administration of government contract funds. The proposed rule also unduly burdens nonprofit agencies and will detrimentally affect their ability to provide their altruistic services.

In addition, Congress already has begun to consider numerous reforms in the charitable sector, including the area of governance, and it seems imprudent to introduce new governance standards before Congress has completed its work. Finally, given that the Committee has not found widespread incidents of wrongdoing by nonprofit agencies participating in the JWOD program, the proposed rule seems unnecessary.

#### **I. New Governance Standards for Nonprofit Organizations are Unnecessary for the Javits-Wagner-O'Day (JWOD) Program**

The Committee notes in its proposed rule that "isolated instances of excessive executive compensation for nonprofit agency executives; a perceived lack of full disclosure in the financial reporting of nonprofit agencies; and the absence of formal guidelines to establish independent boards of directors for JWOD-affiliated central nonprofit agencies and nonprofit agencies prompted this proposed change." However, given that these were "isolated instances," it seems unnecessary to implement new rules at this time. In fact, the Committee itself acknowledges that "based on its experience managing the JWOD program, . . . the overwhelming majority of JWOD-affiliated central nonprofit agencies and nonprofit agencies operate in an ethical and accountable manner."

Given that the wrongful deeds have been isolated and that the Committee's empirical evidence indicates that nonprofit agencies participating in the JWOD program continue to provide their altruistic services in an ethical manner, it appears that the proposed rule is an overreaction.

## **II. The Proposed Rule is Redundant and Exceeds the Committee's Jurisdiction**

The IRS currently has primary oversight and enforcement authority over the charitable sector. Moreover, the IRS grants nonprofit status to an organization that meets federal requirements for tax-exempt organizations, but also can revoke that tax-exempt status if an organization violates those requirements. The IRS also has the power to impose intermediate sanctions on any nonprofit organization that violates the excess benefit transaction rules (such as executive compensation). The IRS also oversees the annual, mandatory filing of Form 990, which discloses to the public the organization's finances including administrative expenses and executive compensation.

The IRS was given these powers to ensure that the charitable sector received clear instructions and regulations from a single federal entity. However, the Committee's proposed rule creates potentially duplicative and confusing regulations. Nonprofit agencies participating in the JWOD program will have to compare IRS regulations and the Committee's regulations side-by-side and struggle to find clarity when those two regulations differ.

Finally, not only has the Committee proposed a duplicative rule that will confuse nonprofit agencies, the Committee has exceeded its jurisdiction by drafting it. The Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) does not appear to bestow any authority on the Committee to set any governance standards of this nature.

## **III. The Proposed Rule is Overly Burdensome and Arbitrary**

The proposed governance standards would impose an onerous burden on those nonprofit agencies participating in the JWOD program. The certification process and proposed board and audit committee structure and function provisions are unreasonable, particularly for smaller nonprofit agencies that do not have the resources to implement such requirements. Requiring the completion of an annual certification form instead of a copy of the IRS Form 990 is not only duplicative, but it also exhausts valuable time and resources.

In addition, the proposed rule is unclear when defining "adequate justification" for executive compensation. The proposed rule cites a list of criteria used to assess the "reasonableness" of the compensation, but the Committee fails to explain how it will apply these criteria. The lack of clarity will undermine the Committee's goal of curbing compensation abuses. Perhaps more importantly, using the proposed salary level of \$207,000 (the highest paid career Federal government employee) as the basis for determining whether a nonprofit executive's salary is unreasonable seems too arbitrary of a threshold. It does not make logical sense to expect the agencies to pay their executives no more than the highest paid federal employee. This proposed standard totally ignores corporate, for-profit and not-for-profit compensation practices. Furthermore, the proposed rule fails to provide any substantive justification for implementing this arbitrary ceiling. No other department or agency appears to have such a standard. Therefore, the \$207,000 cap seems discriminatory toward those nonprofits participating in the JWOD program.

#### IV. The Committee Should Not Preempt Congressional Reform

The Senate Finance Committee and AFP are reviewing an array of nonprofit governance and accountability issues including those raised in the JWOD proposed rule. The JWOD Committee should not impose new changes while this comprehensive review effort is underway.

It makes no sense to impose separate, potentially conflicting, rules for the 650 nonprofit organizations participating in the JWOD Program while this broader review is pending.

#### CONCLUSION

For the reasons stated above, AFP respectfully requests the Committee to withdraw its new standards for governance.

I appreciate the opportunity to share AFP's views with you. I look forward to working with the Committee to address the many issues posed by the proposed rule.

Thank you for your time and consideration.

Sincerely,



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